Supreme Court, U.S.
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No. 99-1434

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

THE MEAD CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

The Mead Corporation has no parent company and there is no publicly held company which owns 10% or more of The Mead Corporation's stock.

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to the provisions set out by Petitioner, the following statutory and regulatory provisions are pertinent to the Court's consideration of the Petition for a Writ of Certiorari ("Petition" or "Pet. Cert.").

1. 19 C.F.R. § 177.9(c):

> (c) *Reliance on ruling letters by others.* A ruling letter is subject to modification or revocation without notice to any person, except the person to whom the letter was addressed. Accordingly, no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter.

2. The tariff provisions under which the imported loose-leaf day planners were classified by Customs and claimed classifiable by Mead, respectively, subheadings 4820.10.20 and 4820.10.40 of the Harmonized Tariff Schedule of the United States ("HTSUS"), are set forth in their entirety[1]:

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1. Despite the statutory requirement that tariff classification be determined according to the terms of the headings, *see* 19 U.S.C. § 1202, General Rule of Interpretation 1, the Petition fails to recite the superior headings (*i.e.*, 4820 and 4820.10) applicable to 4820.10.20. The Petition also entirely omits 4820.10.40, the tariff provision claimed by Mead. Pet. Cert. 3. The omitted headings highlight the distinction drawn between the larger category of "diaries and similar articles" (with no restrictions as to binding) in heading 4820, and the narrower category "[d]iaries, . . . bound" in 4820.10.20, which clearly excludes both *unbound* diaries and articles *similar* to diaries. Customs asserts that the products at issue should be classified as "diaries, bound," even though they are neither diaries nor bound. The Federal Circuit correctly held that the articles fall within the basket "other" provision of 4820.10.40.

4820 Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles, exercise books, blotting pads, binders (loose-leaf or other), folders, file covers, manifold business forms, interleaved carbon sets and other articles of stationery, of paper or paperboard; albums for samples or for collections and book covers (including cover boards and book jackets) of paper or paperboard:

4820.10 Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles

4820.10.20 Diaries, notebooks and address books, bound; memorandum pads, letter pads and similar articles 3.6% (1995)

4820.10.40 Other 0%

COUNTER-STATEMENT OF THE CASE

The Petition arises from the Customs Service's ("Customs") tariff classification of five models of "day planner" — *i.e.*, a loose-leaf arrangement of calendar, address book, notepad and, in some instances, additional material such as a ruler — imported by Respondent The Mead Corporation ("Mead"). The dispute is whether loose-leaf day planners[2] are properly classifiable as "bound diaries" under tariff provision subheading 4820.10.20, or whether — because they are neither "bound" nor "diaries" — the day planners are properly classifiable in the basket "other" provision, subheading 4820.10.40.

2. Although the Petition's "Questions Presented" describe the day planners at issue as "spiral-bound and ring-bound," Pet. Cert. (I), Mead does not import any spiral-bound day planners. Only the classification of loose-leaf day planners is at issue.

This issue arose shortly after the January 1, 1989 effective date of HTSUS, when Customs issued classification rulings which classified other importers' day-planner products under the basket "other" provision, subheading 4820.10.40. *See, e.g.*, Headquarters Ruling ("HQ") 085086 (Sept. 13, 1989), 1989 WL 381276; HQ 085515 (Dec. 14, 1989), 1989 WL 381472. Because Customs regulations precluded Mead from placing any reliance on classification rulings addressed to other importers or non-identical articles, *see* 19 C.F.R. § 177.9(c) ("[N]o other person should rely on the ruling letter or assume that the principles of that [classification] ruling will be applied in connection with any transaction other than the one described in the letter."), Mead requested a classification ruling on the day planners that it was importing. In New York Ruling 864206 (June 19, 1991), 1991 U.S. Custom NY LEXIS 344, Customs classified a Mead day planner, consistent with its classification of the other importers' day planners, under the basket "other" provision, subheading 4820.10.40. Appendix ("App."), *infra*, 1a-3a. That provision imposed no duty.

However, in HQ 953126 (Jan. 11, 1993), 1993 WL 68471, Customs modified its previous ruling and reclassified Mead's loose-leaf day planners as "bound diaries" under HTSUS subheading 4820.10.20, which, at the time, imposed a duty of 4.0%.[3] App., *infra*, 4a-6a. Mead filed administrative protest number 4501-93-100016, contesting the changed classification

3. For the years 1993 and 1994, subheading 4820.10.20 carried a 4.0% rate of duty. Beginning January 1, 1995, the duty rate for goods classifiable thereunder has been annually reduced by .4%. The reductions are scheduled to continue until the duty rate reaches 0% on January 1, 2004. The duty rate for articles classifiable in the tariff provision claimed by Mead, subheading 4820.10.40, has remained unchanged at 0%. The Petition erroneously states that the subheading 4820.10.20 duty rate in 1993 and 1995 was 3.2%. Pet. Cert. 3, 5. The duty rate for those years was actually 4.0% and 3.6%, respectively.

and consequent increase in duty rate. The protest was mooted, however, by Customs' August 18, 1993 approval of Mead's independent request that the entries impacted by HQ 953126 be reliquidated[4] *at no duty* because of Mead's detrimental reliance on the earlier ruling.[5] *See* HQ 953690 (Aug. 18, 1993).[6] App., *infra*, 7a-10a. Since then, Customs has continued to classify various models of Mead's loose-leaf day planners as "bound diaries" under HTSUS provision 4820.10.20. Mead has paid the duty mandated under provision 4820.10.20 and has filed protests of all such classifications.

In 1996, Mead filed a complaint, pursuant to 19 U.S.C. § 1514(a), against Customs in the Court of International Trade ("CIT"), seeking a judgment that Customs had erred in classifying several representative models of Mead's imported loose-leaf day planners as "bound diaries" and that the day

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4. "Liquidation" is a term of art referring to the final accounting between Customs and the importer for the duties owed on an entry. *See* 19 C.F.R. § 159.1.

5. Disregarding the fact that Mead's protest was rendered moot by the detrimental reliance ruling, Customs denied Mead's protest, in HQ 955937 (Oct. 21, 1994), 1994 WL 712863. Appendix to Petition ("Pet. App.") 47a. HQ 955937 is specifically addressed to particular entries for which Mead had already received a refund pursuant to its request for detrimental reliance. Pet. App. 29a. The Petition quotes HQ 955937 extensively, points out that Mead "did not seek judicial review of that classification decision," and suggests that Mead implicitly accepted the classification. Pet. Cert. 8. As Customs is fully aware, Mead's decision not to seek review of that particular ruling was not an acceptance of the classification. Rather, no judicial review of that ruling was necessary, as Mead had already obtained complete relief from any obligation to pay a duty on the affected entries through the August 1993 grant of detrimental reliance relief. App., *infra*, 7a-10a.

6. No Westlaw or Lexis reference is provided for rulings that are not currently available through those public databases.

planners should be properly classified, as they originally had been, under the duty-free basket "other" provision, subheading 4820.10.40. There being no dispute on the facts, both parties immediately moved for summary judgment in the CIT.

Despite the Petition's suggestions to the contrary, neither party sought review of any particular ruling issued by Customs; rather, the parties sought *de novo* review of the appropriate classification for the subject imported merchandise, pursuant to 28 U.S.C. § 2640(a)(1). Customs[7] initially argued that the classification (but not any specific Customs ruling) should be accorded deference under both 28 U.S.C. § 2639(a)(1) and *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See* Defendant's Reply to Plaintiff's Opposition to Defendant's Cross-Motion for Summary Judgment at 2-6. But on December 22, 1997, while the fully briefed summary judgment motions were pending, Customs withdrew its deference arguments in a one-paragraph letter to the CIT:

> Subsequent to the submission of all briefs by the parties on cross-motions for summary judgment in the above-referenced matter, the Court of Appeals for the Federal Circuit rendered a decision in *Rollerblade, Inc. v. United States*, __ Fed. Cir. (T) __, 112 F.3d 481 (1997) ("*Rollerblade*"). The Court of Appeals found that Customs' classification decision was not entitled to deference under either the statutory presumption of correctness (28 U.S.C.

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7. Since the commencement of the CIT proceedings, the United States government has acted as the litigating party on Customs' behalf. For consistency and ease of reference, this Opposition shall use "Customs" to refer to both Customs and the government litigating on behalf of Customs.

> § 2639(a)(1)) or the *Chevron* doctrine (*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*). *Inasmuch as the government's briefs in this action also discuss the presumption of correctness and deference, we withdraw our arguments to the extent they conflict with the Rollerblade decision.*

App., *infra*, 11a-12a (emphasis added).

The CIT ruled in Customs' favor on the motions for summary judgment, and Mead appealed to the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over appeals from the CIT. *See* 28 U.S.C. § 1295(a)(5). Consistent with Customs' waiver of any claim to deference, Customs did not advance an argument that the Federal Circuit should defer to any underlying Customs rulings. However, after both parties had fully briefed Mead's appeal, this Court rendered its decision in *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999), and the Federal Circuit issued an Order, dated May 27, 1999, requesting supplemental briefs on the following question:

> How, if at all, does the Supreme Court's decision in *United States v. Haggar Apparel Co.*, 119 S. Ct. 1392 (1999), affect this Court's standard of review of classification rulings issued by the United States Customs Service?

App., *infra*, 13a-14a.

Thereafter, the Federal Circuit reversed the CIT and held that the day planners are properly classifiable under the basket "other" provision, subheading 4820.10.40, which Customs had originally applied. Pet. App. 16a. In reaching its decision, the Federal Circuit held that Customs classification rulings are not entitled to deference under *Chevron*. *Id.* at 5a, 8a. That holding prompted the filing of Customs' Petition.

REASONS FOR DENYING THE WRIT

This case is an inappropriate vehicle for reviewing Customs' claim that deference should be accorded to Customs classification rulings for the following reasons:

1. The Federal Circuit's decision does not conflict with any decision of this Court nor with the decision of any other court of appeals. Consequently, the Federal Circuit's refusal to extend *Chevron* deference to Customs classification rulings lacks the traditional substantive basis for granting certiorari.

2. Petitioner waived its deference claims below, and it is not entitled to this Court's review of its waived claims.

3. There is no classification ruling for which Customs urged deference below, and, consequently, there is no record regarding Customs' procedures for issuing classification rulings for this Court to consider in determining whether deference for such rulings is appropriate.

4. The Federal Circuit's decision will not deprive "importers and the Customs Service [of] effective guidance for a wide range of transactions." Instead, the Federal Circuit's denial of deference to classification rulings continues the regulatory scheme within which importers and the Customs Service have long conducted themselves.

ARGUMENT

I. THE FEDERAL CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OTHER COURT OF APPEALS.

The Petition undertakes to paint a portrait of the Federal Circuit as a rogue circuit, out of step with this Court and other circuits on the bestowal of deference to interpretive decisions of administrative agencies, but the Federal Circuit's decision below, considered in the context of the decisions of this Court and other circuit courts, does not support Petitioner's contentions. The Federal Circuit carefully considered whether the decision in *Haggar* — this Court's most recent statement regarding the deference due interpretive determinations of the Customs Service — required the application of *Chevron* deference to routine Customs classification rulings. The court correctly held that *Haggar* did not require *Chevron* deference. Pet. App. 4a-7a.

The Federal Circuit's decision does not conflict with *Haggar*; it declined to extend the *Haggar* holding to interpretive decisions other than Customs regulations, the subject to which this Court's *Haggar* decision was expressly limited. *See* 526 U.S. at 383 ("The question is whether these *regulations*, deemed controlling by the Treasury, are entitled to judicial deference in a refund suit brought in the Court of International Trade. . . . [W]e hold the *regulation* in question is subject to the analysis required by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). . . .") (emphasis added). In *Haggar*, this Court did not address Customs classification rulings, and the Federal Circuit, addressing *Haggar*'s impact on the appeal before it, properly explored the distinctions

between the notice-and-comment published regulations accorded deference in *Haggar* and the ordinary Customs classification rulings that are the subject of the Petition.[8]

In according *Chevron* deference to Customs regulations, this Court recognized that notice-and-comment regulations, like a statute, are binding upon the public; they "help to define the legal relations between the Government and regulated entities" by "clarify[ing] the rights and obligations of importers." *Haggar*, 526 U.S. at 388. Like statutes, Customs regulations establish legal norms to which the public — all importers of the affected goods — must adhere. Customs classification rulings, unlike Customs regulations, are limited by regulation to the precise importer and merchandise addressed therein. *See* 19 C.F.R. § 177.9(b)(2) ("Each ruling letter setting forth the proper classification of an article under the provisions of the [HTSUS] will be applied *only with respect to transactions involving articles identical* to the sample submitted with the ruling request or to articles whose description is identical to the description set forth in the ruling letter.") (emphasis added); § 177.9(c) ("A ruling letter is subject to modification or revocation without notice to any person, except the person to whom the letter was addressed. Accordingly, *no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter.*") (emphasis added). Rather than constituting a legal directive by which importers may guide their behavior, Customs classification rulings merely constitute an application of legal rules to a particular factual situation, without precedential effect on any other factual

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8. The Federal Circuit reserved opinion on Customs classification rulings that undergo notice-and comment procedures, such as those provided for in 19 C.F.R. § 177.10(c). Pet. App. 6a.

situation. This is not the type of administrative interpretation to which *Chevron* and *Haggar* were directed.[9] Far from conflicting with any of this Court's decisions, the Federal Circuit's decision not to extend this Court's *Haggar* holding was entirely consistent with this Court's jurisprudence.[10]

Nor did the decision below conflict with the decisions of any other courts of appeals. There is certainly no direct conflict, as the Federal Circuit has exclusive jurisdiction over the subject matter of Customs classification decisions. *See* 28 U.S.C. § 1295(a)(5) (Federal Circuit exclusive

9. Customs' arguments in the *Haggar* litigation reflect Customs' own recognition of the crucial distinction between its regulations and its classification rulings. The underlying dispute in *Haggar* involved not only the regulation addressed by this Court (19 C.F.R. § 10.16(c)), but also a classification ruling interpreting the regulation. *See* HQ 819794 (Oct. 10, 1986). Customs, however, conspicuously omitted consideration of the ruling from its petition for certiorari. Cementing Customs' own dismissive views of its own rulings, Customs then argued before this Court that "[p]roceedings in the Tax court . . . like the proceedings in the Court of International Trade on customs protests, are 'unlike judicial review of the actions of other agencies [in that] any "record" made in the Service, including the reasons for its assessment, is irrelevant.' " Reply Brief for the United States at 3 n.2, *Haggar* (No. 97-2044) (quoting M.I. Saltzman, *IRS Practice and Procedure* ¶ 1.05[2][a], at 1-31 (2d ed. 1991)). In other words, Customs informed this Court that its rulings — which contain Customs' expression of the reasoning behind classifications decisions — are to be disregarded when the decisions are subjected to judicial review.

10. Customs' reliance on this Court's decision in *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978), for the proposition that this Court had, prior to *Chevron*, extended something less than *Chevron* deference to Treasury statutory interpretations, is misplaced. Pet. Cert. 16-17. In *Haggar*, this Court referenced *Zenith* for historical context, but did not cite it as authority to extend *Chevron* deference to Customs notice-and-comment regulations. *See* 526 U.S. at 393.

jurisdiction over appeals from CIT); § 1581(a) (CIT exclusive jurisdiction over protests of Customs classification decisions). But, more importantly, there is no merit to Petitioner's efforts to create the illusion of a conflict by arguing that the Federal Circuit's judgment is incompatible with the grand scheme of judicial treatment of *all* administrative rulings. On the contrary, the Federal Circuit's judgment is consistent with court of appeals decisions concerning the accordance of *Chevron* deference to analogous administrative rulings.

The Federal Circuit's denial of deference for Customs rulings was informed by this Court's analogy between customs and tax matters, *see Haggar*, 526 U.S. at 394, and was based upon the observation that this Court has accorded deference to IRS regulations, *see Atlantic Mut. Ins. Co. v. Commissioner*, 523 U.S. 382, 389 (1998), but has not extended deference to IRS interpretive rulings. *See Commissioner v. Schleier*, 515 U.S. 323, 336 n.8 (1995) (noting that IRS interpretive rulings "do not have the force and effect of regulations" (quoting *Davis v. United States*, 495 U.S. 472, 484 (1990))); *see also United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 n.9 (1992) (declining to be guided by inapposite IRS rulings "[e]ven if they were entitled to deference"). Likewise, following this Court's direction, the various courts of appeals have consistently declined to apply *Chevron* deference to Revenue Rulings issued by the IRS. *See, e.g., Estate of Kosow v. Commissioner*, 45 F.3d 1524, 1528 n.4 (11th Cir. 1995) (revenue ruling is "merely an opinion of an IRS attorney" and is "not binding on the courts"); *First Chicago NBD Corp. v. Commissioner*, 135 F.3d 457, 458-59 (7th Cir. 1998) (not applying *Chevron* deference, but lesser standard of "respectful consideration"); *Wood v. Commissioner*, 955 F.2d

908, 913 (4th Cir. 1992) (not applying *Chevron* deference, but lesser standard of "considerable weight").[11] Indeed, the Federal Circuit concluded that Customs classification rulings are "an even less formalized body of interpretation than IRS revenue rulings," Pet. App. 7a, and, therefore, even less worthy of *Chevron* deference. Rather than conflicting with other courts, the Federal Circuit's reasoning by analogy to IRS rulings illustrates that the Federal Circuit's holding is entirely consistent with the decisions of the other courts of appeals.

Petitioner also contends that the Federal Circuit has created an issue worthy of certiorari by supposedly declining to accord to Customs classification rulings deference at a reduced (but unspecified) level — something other than "controlling weight" established in *Chevron*. 467 U.S. at 844. The Federal Circuit did not decline to apply reduced deference because it was never *asked* to apply a reduced standard of deference.[12] However, even if the issue had been properly before the court below, rejection of a reduced deference standard would have been appropriate. Neither *Haggar* nor any other decision of this Court or of any court of appeals suggests, let alone provides authority for, the proposition that Customs classification rulings are entitled to any kind of deference.

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11. Pending before the Court is *MCI Communications Corporation, et al. v. United States*, Petition No. 97-1176, which seeks certiorari on the form of lesser deference, if any, applicable to IRS Revenue Rulings. The lesser deference claim in *MCI* was expressly raised before and addressed by the court of appeals. Here, on the other hand, the claim to lesser deference was never raised nor considered below. *See* Argument II, *infra* at 13.

12. *See* discussion in Argument II, *infra* at 13-15.

There is simply no conflict here between the Federal Circuit decision and any decision of this Court or of any court of appeals. The Federal Circuit decision is in harmony with *Haggar*, and the writ of certiorari should be denied.

II. IT IS INAPPROPRIATE TO REVIEW PETITIONER'S DEFERENCE CLAIMS IN VIEW OF PETITIONER'S WAIVER OF ITS DEFERENCE ARGUMENTS BELOW.

As clearly reflected in Customs' December 22, 1997 letter to the CIT, App., *infra*, 11a-12a, Customs expressly and unequivocally waived any claim that its classification rulings are entitled to *Chevron* deference.[13] Accordingly, this is an unsuitable case for a grant of the writ of certiorari. Once a party has withdrawn a claim, absent exceptional circumstances (which are not present here), it is prohibited from reasserting that claim before this Court. *See Helvering v. Wood*, 309 U.S. 344, 348-49 (1940) (precluding IRS from asserting claim that it had expressly abandoned below); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994) (and cases cited therein).

Like the waiver of its *Chevron* deference claims, it is indisputable that Customs failed to raise, and the lower

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13. A litigant's decision to insert, drop, or omit claims often involves a broad mix of strategic, factual and legal factors. Nevertheless, whatever the reason, once a claim is waived, an appellate court should not revive it. *See Motorola, Inc. v. Interdigital Tech. Corp.*, 121 F.3d 1461, 1467 (Fed. Cir. 1997) ("This Court has no legal warrant to correct a party's litigation errors or to review questions not preserved for appeal"); *Violette v. Smith & Nephew Dyonics, Inc.*, 62 F.3d 8, 11 (1st Cir. 1995), *cert. denied*, 517 U.S. 1167 (1996).

courts never addressed, a non-*Chevron* deference claim for a classification ruling regarding the Mead day planners.[14] Just as issues waived below will not be considered by this Court, issues that were neither raised below nor considered by the lower courts will not be accepted and addressed by this Court. *See E.E.O.C. v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (dismissing writ of certiorari as improvidently granted because this Court's "normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Courts of Appeals."); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

Further, although not expressly stated, Customs' December 22, 1997 letter to the CIT, which expressly waived *Chevron* deference, also implicitly waived non-*Chevron* deference. That letter withdrew Customs' arguments "to the extent they conflict with the *Rollerblade* decision." App., *infra*, 12a. In *Rollerblade*, the Federal Circuit held that "*no deference* attaches to Customs' classification decisions either under 28 U.S.C. § 2639 or under *Chevron*

14. After the Federal Circuit had decided in favor of Mead, Customs filed a Petition For Rehearing En Banc, in which, for the first time, Customs referenced cases in which courts addressed non-*Chevron* deference. Yet even in this limited context, Customs made no express argument that the court should accord some lesser degree of deference to Customs classification rulings. Moreover, it is the practice in the Federal Circuit, as in other courts of appeals, not to consider arguments raised initially in a rehearing petition. *See Pentax Corp. v. Robison*, 135 F.3d 760, 762 (Fed. Cir. 1998); *accord United States v. Bongiorno*, 110 F.3d 132, 133 (1st Cir. 1997); *Boardman v. Estelle*, 957 F.2d 1523, 1535 (9th Cir. 1992), *as supplemented on denial of rehearing, cert. denied*, 506 U.S. 904 (1992).

where there are no disputed issues of material fact." *Rollerblade, Inc. v. United States*, 112 F.3d 481, 484 (Fed. Cir. 1997) (emphasis added). The inartful language of the waiver letter, coupled with Customs' failure to raise any lesser deferential standard previously in this litigation, can only lead to the conclusion that the letter was intended to waive all claims of deference, pursuant to *Chevron* or otherwise.

III. THE RECORD BELOW IS INADEQUATE TO PERMIT CONSIDERATION OF THE DEFERENCE ISSUE RAISED IN THE PETITION.

Because of Customs' deliberate waiver of its claim to *Chevron* deference and its complete failure to raise a claim to a lesser deferential standard, the record below is inadequate to permit a meaningful analysis of whether Customs' interpretive rulings should be entitled to the deference now claimed. This Court should not grant a writ of certiorari where the record below is inadequate to support consideration of the questions presented. *See, e.g., Pilcher v. Mississippi*, 420 U.S. 938 (1975) (denying petition for writ of certiorari "for consideration of questions not adequately presented by the record before us"). Here, the Petition seeks review of whether deference should be accorded to Customs' interpretive rulings, but the record is missing the essential element — an interpretive ruling. There was *no* ruling at issue in the proceedings below. Rather, as discussed *supra* at 5, Mead sought review of the specific classification applied to its day planners; it did not seek review of any specific interpretive ruling, and none was before the CIT and the Federal Circuit.[15] Customs has chosen to append HQ 955937, 1994 WL 712863, to its Petition, Pet. App. 28a-47a,

15. When an importer contests the denial of a protest of a classification decision, the CIT reviews the classification decision, not the underlying reasoning or any particular ruling. *See* 28 U.S.C. § 2640(a)(1) (CIT reviews classification decision *de novo*).

but neither Mead nor Customs ever sought review of that ruling, in part because all of the entries to which the ruling pertained were reclassified as duty-free pursuant to Mead's detrimental reliance claim. *See* n.5, *supra* at 4.

Since there is no specific interpretive ruling for which deference was sought, the record lacks the necessary foundation to determine whether Customs' classification rulings are the type of administrative determination that is entitled to deference under *Chevron*. In *Chevron* this Court conducted an extensive review of the legislative and regulatory history related to the challenged regulations that had been promulgated by the Environmental Protection Agency. 467 U.S. at 853-65. It reached its deference decision only after determining that "the regulatory scheme [was] technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." *Id.* at 865. To perform a corresponding analysis of Customs classification rulings, this Court would require a record that established, *inter alia*, the scheme under which the rulings are made, the volume of rulings coming out of the agency, the number of different offices from which the rulings originate, the consistency of guidance for the issuance of rulings from various offices, the internal process for issuing rulings, the qualifications of the personnel making the rulings and the policy considerations (if any) that go into the ruling process. However, because the deference issue was not raised below, the record is utterly devoid of this information, which is crucial to analyzing Customs rulings under *Chevron*, and the decision below is not appropriate for review by this Court.

IV. RATHER THAN DEPRIVING IMPORTERS AND THE CUSTOMS SERVICE OF EFFECTIVE GUIDANCE, THE FEDERAL CIRCUIT'S DECISION TO DENY *CHEVRON* DEFERENCE PRESERVES THE GUIDANCE UNDER WHICH CUSTOMS AND IMPORTERS HAVE HISTORICALLY CONDUCTED THEIR AFFAIRS.

The Petition includes a policy argument that without *Chevron* deference (or some unspecified lesser deference), Customs and importers are suddenly left adrift, with guidance only available through expensive litigation. Customs contends that the Federal Circuit's refusal to honor Customs classification rulings with judicial deference alters the legal terrain and creates undesirable uncertainty. Contrary to Customs' assertions, the Federal Circuit's decision accords with a consistent series of Federal Circuit and CIT decisions declining to defer to Customs classification rulings. *See Rollerblade*, 112 F.3d at 484; *Crystal Clear Indus. v. United States*, 44 F.3d 1001, 1003 n.* (Fed. Cir. 1995); *Anval Nyby Powder AB v. United States*, 927 F. Supp. 463, 469 (Ct. Int'l Trade 1996); and *Semperit Industrial Products, Inc. v. United States*, 855 F. Supp. 1292, 1299-1300 (Ct. Int'l Trade 1994). Indeed, since the enactment of the Tariff Laws more than 200 years ago, Customs classification rulings have never been accorded *Chevron* or quasi-*Chevron* judicial deference. *See* S. Rep. No. 96-249, 96th Cong., 1st Sess. 251 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 637 ("antidumping and countervailing duty determinations, *unlike traditional value and classification decisions*, are not subject to *de novo* review") (emphasis added) (discussed *infra* at 19-20); *see also, e.g.*, *In re Two Hundred Chests of Tea*, 22 U.S. (9 Wheat.) 430 (1824) (according no deference to Customs classification determination); *Rollerblade*, 112 F.3d at 484 (holding Customs classification rulings not entitled to *Chevron* deference).

Considering the administrative framework within which the rulings are spawned, the absence of deference makes perfect sense. Customs regulation 19 C.F.R. § 177.9(c) provides that a Customs classification ruling and the principles enunciated therein are binding on Customs *only if the importer and the merchandise remain identical*. If either the importer or the merchandise differs from that which was identified in a "binding" classification ruling, Customs is not bound by its ruling, and may, in fact, completely ignore its own precedent. *See, e.g.*, HQ 960977 (June 7, 1999) (citing 19 C.F.R. § 177.9(c) and refusing to consider classification ruling to different importer on "similar" articles). Ironically, Customs wants this Court to extend greater deference to Customs classification rulings than it is willing to extend to its own rulings.

Customs' reluctance to place faith in its own rulings is understandable considering that Customs regularly issues more than 10,000 rulings a year, and it is authorized to issue rulings from all of its 200-plus ports of entry. *See* 19 C.F.R. § 177.2(b)(2)(ii)(B); 19 C.F.R. § 101.3(b)(1). It is inevitable that such a massive daily outpouring of rulings will result in conflicting determinations. In fact, Customs has promulgated a regulation entitled "Inconsistent Customs Decisions" to address this unavoidable situation. 19 C.F.R. § 177.12.

Petitioner's reliance on the language of 19 U.S.C. § 1502(a) — directing the Secretary of the Treasury to publish regulations "establishing procedures for the issuance of binding rulings prior to the entry of the merchandise concerned" — is misplaced and misleading. The Petition suggests that, by empowering Customs to make "binding rulings," Congress tacitly advocated the application of *Chevron* deference to Customs rulings. Pet. Cert. 13. On the contrary, as reflected in the legislative history and in comparison with other statutes, the authorization to issue binding rulings was never intended nor designed to limit *de novo* review of Customs classification rulings.

The "binding ruling" language of § 1502(a) was added in 1993 for the sole purpose of providing each *importer* with greater certainty with respect to its future importation of the same goods, not for providing Customs with greater authority: "These amendments will provide greater certainty to *importers* through the binding rulings program while also permitting Customs to accelerate the entry process." H. Rep. No. 103-361 (I), 103rd Cong., 1st Sess. 138 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2552, 2688 (emphasis added). In view of the high volume of Customs rulings issuing simultaneously from so many different offices, importers need assurance that if they receive a binding ruling from, say, New York Customs, the same goods imported through another U.S. Customs port, *e.g.*, Seattle, will be classified and appraised identically. *Chevron* deference is immaterial to the certainty required by importers.

If, as Customs contends, Congress had intended to alter the judicial review applicable to Customs classification rulings, it would have done so explicitly, not implicitly. In the legislative history underlying the Trade Agreements Act of 1979, which amended the judicial review portions of the statute, the intent to change the existing judicial standards of review was expressly addressed:

> The Treasury Department has consistently asserted that antidumping and countervailing duty determinations, *unlike traditional value and classification decisions*, are not subject to *de novo* review. . . .
>
> Section 516A would remove all doubt on whether *de novo* review is appropriate by excluding *de novo* review from consideration as a standard in antidumping and countervailing duty determinations.

S. Rep. No. 96-249, 96th Cong., 1st Sess. 251 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 637 (emphasis added). Congress then enacted 19 U.S.C. § 1516a(b), which expressly provides the judicial standards of review — *e.g.*, arbitrary and capricious, abuse of discretion, substantial evidence — to be applied to the administrative countervailing duty and antidumping duty determinations specified therein. It did not, however, enact a new standard of review for appeals from classification rulings. Review of classification rulings was *de novo* before the Trade Agreements Act of 1979, and Congress allowed it to remain so thereafter. This legislative history behind Congress's acts in 1979 and 1993 illustrates: (1) that both Congress *and* the Treasury Department have historically acknowledged that Customs classification decisions are subject to *de novo* judicial review; (2) that when Congress intends to change the scope of judicial review, it does so expressly, not by implication; and (3) that Congress has not changed the review standard for appeals from classification rulings.

There is no basis for Petitioner's prediction that the courts' refusal to defer to Customs classification rulings will lead to an increase in "wasteful litigation," particularly when the Federal Circuit's decision does nothing more than maintain the status quo. Pet. Cert. 13. However, endowing the rulings with controlling legal authority would deprive importers of a meaningful avenue of review of Customs classifications and most certainly would result in an increase in uncontested duties paid to Customs. In any event, considered in light of the lack of authority that Customs gives to its own rulings, Petitioner's policy argument is hollow, and provides no basis for this Court to grant the writ of certiorari.

CONCLUSION

Customs' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SIDNEY H. KUFLIK
Counsel of Record
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233 Broadway
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(212) 608-2700

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Counsel for Respondent

APPENDIX

APPENDIX A — NY RULING 864206 FROM DEPARTMENT OF THE TREASURY, U.S. CUSTOMS SERVICE TO O'NEILL & WHITAKER, INC. DATED JUNE 19, 1991

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
NEW YORK, N.Y.

NY 864206

JUN 19 1991

CLA-2-48:S:N1:234 864206

CATEGORY: Classification

TARIFF NO.: 4820.10.4000

Mr. Michael O'Neill
O'Neill & Whitaker, Inc.
1809 Baltimore Avenue
Kansas City, MO 64108

RE: The tariff classification of a personal planner from Taiwan.

Dear Mr. O'Neill:

In your letter dated June 4, 1991, on behalf of The Mead Corporation, you requested a tariff classification ruling.

A sample of the item in question, a "Personal Planner" (Item No. 47104), was submitted and will be returned as requested. It is a 3 x 14 x 20 cm looseleaf book consisting of

a metal six-ring binder mechanism, complete with pages, permanently mounted inside a vinyl cover. The pages are essentially blank paper inserts grouped into various sections, each distinguished by lines and captions intended to facilitate particular kinds of written entries. The main sections are for monthly and daily activities, meeting notes, and telephone/address listings. The book also contains a page for personal data, a printed six-year calendar page, a fold-out map accompanied by handy reference information, two plastic pages designed to hold cards and other small items, and a plastic page-finder/ruler.

In addition, there is a note pad which may either be stored in a pocket provided on the inside of the back cover or mounted in the binder. The inside of the front cover also incorporates storage pockets, and the book features a strap/snap closure.

The applicable subheading for the No. 47104 "Personal Planner" will be 4820.10.4000, Harmonized Tariff Schedule of the United States (HTS), which provides for other (non-enumerated) articles similar to registers, account books, notebooks, receipt books and diaries. The rate of duty will be free.

A paper sleeve, which you identify as a "sale tag," fits over the front cover of the planner. This sleeve is printed with the brand name of the item, certain product information, and The Mead Corporation's name and U.S. address followed by the words, "Made in Taiwan." You ask for confirmation that this country of origin marking is acceptable.

Although we find that the marking is in a conspicuous place and is legible, we also note that it lacks the degree of permanence that other methods could easily provide. While you indicate that Mead "will only sell this product with the sale tag," there is no assurance that the tags will always remain on the planners prior to retail sale. To avoid potential problems in this regard, it is therefore recommended that the country of origin also be stamped on the inside of the front cover, placed on a sewn-in label, or printed on the "contents page" at the front of the book.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

Sincerely,

s/ Jean F. Maguire
Jean F. Maguire
Area Director
New York Seaport

APPENDIX B — HEADQUARTERS RULING 953126 FROM DEPARTMENT OF THE TREASURY, U.S. CUSTOMS SERVICE TO O'NEILL & WHITAKER, INC. DATED JANUARY 11, 1993

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
WASHINGTON, D.C.

HQ 953126

11 JAN 1993

CLA-2 CO:R:C:T 953126 CAB

CATEGORY: Classification

TARIFF NO.: 4820.10.2010

Mr. Michael O'Neill
O'Neill & Whitaker, Inc.
1809 Baltimore Avenue
Kansas City, MO 64108

RE: Modification of New York Ruling Letter (NYRL) 864206 dated June 19, 1991

Dear Mr. O'Neill:

New York Seaport has requested that this office review NYRL 864206 dated June 19, 1991. Since the issuance of that ruling, our position on the classification of multi-function ring-binder books or daily planners has been modified. Accordingly, this ruling modifies NYRL 864206.

Appendix B

NYRL 864206 concerned the classification of a multi-function ring-binder book, referred to as a "Personal Planner". This "Personal Planner" was comprised of a calendar, a daily planner, an address book, a fold-out map, card holders, a ruler, and a notepad. In NYRL 864206, Customs concluded that the merchandise at issue was classifiable in subheading 4820.10.4000, HTSUSA, the duty-free provision for other (non-enumerated) articles similar to registers, account books, notebooks, receipt books and diaries. Customs determined that the submitted sample, commercially referred to as a "daily planner", was considered a looseleaf book with multi-functions.

After further review, concerning the classification of daily planners or multi-function looseleaf binders, Customs has modified its position on the applicable classification. In Headquarters Ruling Letter (HRL) 089960 dated February 10, 1992, Customs ruled that multi-function looseleaf binders or daily planners are generally used for daily recordkeeping and are classifiable as diaries. HRL 089960 also makes a distinction regarding whether the merchandise at issue is bound and classifiable as a diary under subheading 4820.10.2010, HTSUSA, or not bound and classifiable as an article similar to a diary under subheading 4820.10.4000, HTSUSA. Accordingly, the "Personal Planner" is properly classifiable under subheading 4820.10.2010, HTSUSA. The rate of duty is 4 percent *ad valorem*.

In order to ensure uniformity in Customs classification of this merchandise and eliminate uncertainty, we are modifying NYRL 864206 to reflect the above classification effective with the date of this letter. However, if after your

review, you disagree with the legal basis for our decision, we invite you to submit any arguments you might have with respect to this matter for our review. Any submission you wish to make should be received within thirty (30) days of the date of this letter.

This notice to you should be considered a modification of NYRL 864206 under 19 CFR 177.9(d)(1). It is not to be applied retroactively to NYRL 864206 (19 CFR 177.9(d)(2)) and will not, therefore, affect past transactions for the importation of your merchandise under that ruling. However, for the purposes of future transactions of merchandise of this type, NYRL 864206 will not be valid precedent. We recognize that pending transactions may be adversely affected by this modification, in that current contracts for importation arriving at a port subsequent to this decision will be classified pursuant to it. If such a situation arises, you may, at your discretion, notify this office and apply for such relief from the binding effects as may be warranted by the circumstances. However, please be advised that in some instances involving import restraints, such relief may require separate approvals from other government agencies.

Sincerely,

s/ John Durant
John Durant, Director
Commercial Rulings Division

APPENDIX C — HEADQUARTERS RULING 953690 FROM DEPARTMENT OF THE TREASURY, U.S. CUSTOMS SERVICE TO LAMB & LERCH DATED AUGUST 18, 1993

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
WASHINGTON, D.C.

AUG 18 1993

HQ 953690

CLA-2 CO:R:C:T 953690 CAB

CATEGORY: Classification

TARIFF NO.: 4820.10.4000

Sidney H. Kuflik, Esq.
Lamb & Lerch
233 Broadway
New York, NY 10279

RE: Detrimental Reliance; modification of NYRL 864206; HRL 953126 of January 11, 1993, effective date delayed pursuant to 19 CFR 177.9(d)(3) through April 11, 1993

Dear Mr. Kuflik:

This is in reply to your letter of March 23, 1993, on behalf of your client, Mead Corporation, [hereinafter "Mead"] in which you requested that the effective date of Headquarters Ruling Letter (HRL) 953126, dated January 11, 1993, be delayed through April 11, 1993, with respect to Mead.

Appendix C

In HRL 953126, Customs modified New York Ruling Letter (NYRL) 864206, dated June 19, 1991. NYRL 864206 classified Style 47102, a looseleaf book bound by a metal six-ring binder in subheading 4820.10.4000 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which is the duty-free provision for other (non-enumerated) articles similar to registers, account books, notebooks, receipt books and diaries. Other relevant New York Rulings were also issued to Mead concerning daily planners and classified such merchandise under subheading 4820.10.4000, HTSUSA. These additional rulings were NYRL 866926, dated September 17, 1991, which dealt with Style 47106; NYRL 864284, dated June 21, 1991, which concerned Style 47102; and NYRL 864206, dated June 19, 1991, which concerned Style 47104. In HRL 953126, Customs concluded that Style 47102, commercially referred to as a "daily planner", was a looseleaf book with multi-functions. HRL 953126 reclassified Style 47102 in subheading 4820.10.2010, HTSUSA, with a duty rate of 4 percent *ad valorem*.

In your submission, you state that in reliance upon the cited New York rulings, Mead placed a series of purchase orders for daily planners with corresponding style numbers of 47102, 47103, 47104, 47105, 47106, 47107. You maintain that Mead set its prices for its 1993 day planners based on the issued New York rulings. You also state that the day planners at issue are sold and marketed primarily during the back to school period prior to September 1, 1993, and it would be impractical for Mead to increase its prices prior to the beginning of this period.

Appendix C

You contend that the daily planners at issue are substantially identical to the daily planners which were the subject of the cited New York rulings issued to Mead in 1991. Therefore, Mead relied upon the cited New York rulings to classify the daily planners at issue in this instance. Since NYRL 864206 was modified, effective January 11, 1993, Mead suffered a detriment with regard to the merchandise that was contracted for prior to January 11, 1993. You assert that Mead acted reasonably and in good faith in its reliance on NYRL 864206 and the other New York rulings issued contemporaneously in 1991, both when pricing and classifying the merchandise. Under 19 C.F.R. 177.9(d)(3), the effective date of a ruling letter that modifies or revokes an earlier ruling may be delayed for a period of up to ninety (90) days, provided that the party seeking delay can demonstrate to the satisfaction of the Customs Service that reliance on the revoked or modified ruling was reasonable and such reliance was to the detriment of that party.

After examining the submitted information which consists of purchase orders backed by letters of credit and affidavits signed by officials of Mead, it appears that Mead suffered a detriment because merchandise contracted for prior to the issuance of HRL 953126 is presently subject to a higher duty rate. It was reasonable for Mead to rely on the rate of duty set forth in the cited New York rulings, and therefore, the prerequisite for relief under 19 C.F.R. 177.9(d)(3) has been met. Any relief provided by Customs, however, shall *not* extend to purchase orders placed after January 11, 1993.

Based upon your submission, and pursuant to the regulations set forth above, the effective date of HRL 953126

is delayed by ninety (90) days, (i.e., no later than April 11, 1993) for purposes of liquidating or reliquidating the following entries: 595-0111948-7; 595-0113032-8; 595-0113516-0; 595-0115974-9; 595-0115980-6; 595-0116904-5; 595-0117838-4; 595-0118560-3; 595-0119466-2; 595-0120254-9; 595-0121642-4; 595-0121650-7; 595-0122798-3; 595-0123332-0; 595-0123922-8; 595-0124664-5; 595-0125010-0; 595-0125224-7; 595-0125226-2; 595-0125234-6; 595-0126048-9; 595-0126060-4; 595-0126062-0; 595-0126064-6; 595-0126066-1; 595-0126068-7; 595-0126256-8; 595-0126258-4; 595-0126318-6; 595-0126320-2; 595-0126894-6; 595-0126898-7; 595-0126900-1; 595-0126902-7; 595-0126906-8; 595-0126908-4; 595-0127058-7; 595-0127276-5; 595-0127282-3; 595-0127284-9.

Accordingly, through April 11, 1993, the merchandise consisting of Style Numbers 47102, 47103, 47104, 47105, 47106, and 47107, imported under the foregoing entry numbers should be classified duty free under subheading 4820.10.4000, HTSUSA.

Sincerely,

s/ John Durant
John Durant, Director
Commercial Rulings Division

APPENDIX D — LETTER FROM U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION TO HONORABLE JAMES L. WATSON, UNITED STATES COURT OF INTERNATIONAL TRADE DATED DECEMBER 22, 1997

U.S. Department of Justice
Civil Division

AMR
95-12-01783

International Trade Field Office
Commercial Litigation Branch
26 Federal Plaza, Room 346
New York, New York 10278-0140
Phone 212/264-9230
FAX 212/264-1916

December 22, 1997

Honorable James L. Watson
United States Court of International Trade
One Federal Plaza
New York, New York 10007

Re: Re: The Mead Corporation v. United States,
Court No. 94-06-00346

Dear Senior Judge Watson:

Subsequent to the submission of all briefs by the parties on cross-motions for summary judgment in the above-referenced matter, the Court of Appeals for the Federal Circuit rendered a decision in *Rollerblade, Inc. v. United States*, __ Fed. Cir. (T) __, 112 F.3d 481 (1997) ("*Rollerblade*"). The Court of Appeals found that Customs' classification

decision was not entitled to deference under either the statutory presumption of correctness (28 U.S.C. §2639(a)(1)) or the Chevron doctrine (*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*). Inasmuch as the Government's briefs in this action also discuss the presumption of correctness and deference, we withdraw our arguments to the extent they conflict with the *Rollerblade* decision.

Very truly yours,

Amy M. Rubin
Trial Attorney

cc: Sidney H. Kuflik, Esq.

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED AND FILED MAY 27, 1999

NOTE: Pursuant to Fed. Cir. R. 47.6 this order is not citable as precedent. It is a public order.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

98-1569

THE MEAD CORPORATION,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Before NEWMAN, RADER, and SCHALL, *Circuit Judges*.

ORDER

The parties shall file supplemental briefs, not to exceed 20 pages in length, on or before June 28, 1999.

Only the following question is to be addressed in the briefs:

How, if at all, does the Supreme Court's decision in *United States v. Haggar Apparel Co.*, 119 S. Ct. 1392 (1999),

affect this court's standard of review of classification rulings issued by the United States Customs Service?

FOR THE COURT,

May 27, 1999

s/ Jan Horbaly (AV)
Jan Horbaly
Clerk

cc: Amy M. Rubin, Esq.
Sidney H. Kuflik, Esq.